IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 28 OF 2002

Dennis D'Souza,
resident of Torda,
Salvador do Mundo,
Bardez, Goa. ... Applicant.

versus

State
(I.O.Panaji Police Station) ... Respondent.

Mr. S. D. Lotlikar, Senior Advocate for the Applicant.

Mrs. Winnie Coutinho, Additional Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 5TH JUNE, 2003.

ORAL JUDGMENT

The Applicant being aggrieved by his conviction for an offence punishable under Section 325 r/w 34 of the Indian Penal Code and sentenced to suffer simple imprisonment for 2 months and to pay fine of Rs.500/- by the Judicial Magistrate, First Class, Mapusa, by Judgment dated 6th March, 2003 in Criminal Case No.145/01/Sr. and confirmed by the IInd Additional Sessions Judge, Panaji, in Criminal Appeal No.23/2002 by Judgment dated 27th November,2002, has filed the present Criminal Revision Application.

2. The facts as are necessary for the decision of this revision are set out hereunder:-

The present Applicant and his sister Miss Rushal D'Souza/Original Accused No.1 were charge-sheeted by the Porvorim Police on the allegations that on 10th May, 2001, at about 4.45 p.m., the Applicant and the Original Accused No.1 were removing the boundary stones placed by the Mamlatdar and on the protest by P.W.4, Sumati Laxman Naik, the Original Accused No.1 is alleged to have hit a danda on the right hand. The Applicant is alleged to have abused P.W.4, Sumati Laxman Naik. Charge was framed against the Applicant and Original Accused No.1 for offences punishable under Sections 504 and 325 r/w 34 of the Indian Penal Code. The Judicial Magistrate, First Class, Mapusa, by his aforesaid Judgment acquitted the Applicant and Original Accused No.1 for an offence punishable under Section 504 of the Indian Penal Code but convicted the Applicant and Original Accused No.1 for an offence punishable under Section 325 r/w 34 of the Indian Penal Code. Since the Original Accused No.1 was a lady, the learned Trial Court passed a sentence of simple imprisonment till rising of the Court and fine of Rs.500/-. The Applicant was ordered to undergo imprisonment for 2 months and to pay a fine of Rs.500/-. The Applicant

preferred an Appeal before the IInd Additional Sessions Judge, Panaji, being Criminal Appeal No.23/2002. The learned lower appellate Court by its Judgment dated 27th November, 2002, dismissed the Appeal.

3. Mr. S. D. Lotlikar, learned Senior Counsel appearing on behalf of the Applicant has raised only one point namely that the admitted facts on record are not sufficient for drawing an inference that the Applicant had shared the common intention with Accused No.1 in committing an offence punishable under Section 325 of the Indian Penal Code. According to the learned Senior Counsel appearing on behalf of the Applicant, therefore, the Applicant is entitled to be acquitted and the reasonings of the two Courts below holding that the Applicant shared the common intention is wholly perverse and unsustainable.

4. Mrs. Winnie Coutinho, the learned Additional Public Prosecutor appearing on behalf of the State/Respondent has defended the two Judgments and has urged that the revision be dismissed.

5. Admittedly, according to the prosecution, it was Original Accused No.1, who had dealt a blow of danda on the hand of injured P.W.4, Sumati Laxman

Naik. The learned Trial Court has disbelieved the abuses alleged to have been given by the present Applicant. Admittedly, even according to the prosecution, both the Accused i.e. the present Applicant and Original Accused No.1 were removing the boundary stones placed by the Mamlatdar. Apart from this, no other circumstances have been proved to enable the Court to draw an inference that the present Applicant shared common intention with Original Accused No.1.

6. The learned Trial Court in para 28 of the Judgment has held that the evidence showed that the present Applicant was supporting Original Accused No.1. Since, the Applicant is the brother of Original Accused No.1, therefore, the Applicant is liable to be punished with Original Accused No.2 with the offence punishable under Section 325 of the Indian Penal Code. The learned lower appellate Court before whom it was specifically urged that there was no material to warrant the conviction in para 16 has stated that "it is true that it was Accused No.1 only who hit the danda on the right hand of P.W.4. But when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is made liable by Section 34 of I.P.C.. For that act in the same manner as if it were done by him along. The

Accused Nos.1 and 2 are sister and brother and the Accused No.1 has not challenged the Judgment and sentence. She has already paid the fine".(Emphasis supplied)

7. The learned Trial Court was wholly incorrect in observing that the present Applicant was supporting Original Accused No.1. There is absolutely no evidence on record to suggest that either the present Applicant had exhorted Original Accused No.1 or was instigating Original Accused No.1 to commit the offence. Merely because the Applicant and Original Accused No.1 are brother and sister that would hardly be a ground to infer that they shared the common intention. Moreover, the incident had occurred at the spur of the moment and was not as a result of any prior meeting of mind. The Judgment of the two Courts below and wholly unsustainable and deserves to be quashed and set aside.

8. A reference may usefully be made in a Judgment of the Apex Court in the case of **Sumitra Banik** v. **State of West Bengal** reported in 1999(3) Crimes 201. This was a case where it was alleged that the Accused therein by remaining present at the scene of the offence had encouraged or facilitated the

commission of the offence. The Apex Court observed "we cannot accept the present submission because mere presence of these persons near the place of the incident cannot lead to an inference that they shared the common intention with the other two Accused as they were also residing in that house".

9. With the assistance of the learned Counsel appearing on behalf of the parties, I have perused the Judgments of the two Courts below and according to me, there is absolutely no material on record to warrant the conviction that the Applicant shared the common intention with the Original Accused No.1 in the commission of the offence. The incident had occurred at the spur of the moment. The presence of the Applicant at the scene of the offence along with with Original Accused No.1 was for the purpose of removing the boundary stones and looking to the manner of the incident, it cannot be stated that both the Applicant and the Original Accused No.1 had gathered at the scene of the offence in order to cause injuries to the Complainant P.W.4, Sumati Laxman Naik. The reasoning of the two Courts below is wholly unsustainable. The conviction of the Applicant for an offence punishable under Section 325 of the Indian Penal Code and the sentence passed thereon deserves to be quashed and set aside.

10. in the result, Criminal Revision Application No.28/2002 is allowed. The conviction of the Applicant for an offence punishable under Section 325 of the Indian Penal Code and sentence of 2 months Simple Imprisonment and fine of Rs.500/- as passed by the Judicial Magistrate, First Class, Mapusa, in Criminal Case No.145/01/Sr. and confirmed in Criminal Appeal No.23/2002 by the IInd Additional Sessions Judge, Panaji, is hereby quashed and set aside and the Applicant is acquitted of the aforesaid charge. The Bail Bonds of the Applicant stand cancelled. Fine if paid be refunded to the Applicant.

P. V. HARDAS, J.

RD.